

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

KEVIN ORLANDO GUNN,

Petitioner,

vs.

J.F. SALAZAR, Warden,

Respondent.

CASE NO. 08CV0972-LAB (WMc)

**ORDER ADOPTING REPORT  
AND RECOMMENDATION AND  
DISMISSING PETITION FOR  
WRIT OF HABEAS CORPUS**

Petitioner Kevin Gunn ("Gunn"), a state prisoner, filed his federal habeas petition in this Court on May 22, 2008. (Dkt. No. 1.) Pursuant to 28 U.S.C. § 636, his petition was referred to Magistrate Judge William McCurine for a report and recommendation ("R&R"). Respondent Salazar ("Salazar") filed a motion to dismiss Gunn's petition on August 26, 2008. (Dkt. No. 14.) Judge McCurine issued his R&R on December 5, 2008 recommending that the Court grant Salazar's motion to dismiss. (Dkt. No. 17.) Gunn filed an objection to the R&R on January 2, 2009. (Dkt. No. 18.)

The R&R is devoted exclusively to the timeliness of Gunn's petition. Under the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), state prisoners have one year, absent tolling, to file a federal habeas petition – starting on the date the judgment against them in state court is final. 28 U.S.C. § 2244(d). Salazar argues that Gunn waited over two years to file his petition. Gunn, on the other hand, believes he filed just before a full year expired. The Court agrees with the R&R that Salazar has the better argument and **GRANTS** Salazar's motion to dismiss.

1 **I. Legal Standards**

2 This Court has jurisdiction to review a magistrate judge's report and recommendation  
3 concerning a dispositive pretrial motion. Fed. R. Civ. P. 72(b) *et seq.* "The district judge  
4 must determine de novo any part of the magistrate judge's disposition that has been properly  
5 objected to. The district judge may accept, reject, or modify the recommended disposition;  
6 receive further evidence; or return the matter to the magistrate judge with instructions." Fed.  
7 R. Civ. P. 72(b)(3). In other words, "the district judge must review the magistrate judge's  
8 findings and recommendations de novo *if objection is made*, but not otherwise." *United*  
9 *States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003) (en banc). This Court does not  
10 need to review de novo "findings and recommendations that the parties themselves accept  
11 as correct." *Id.*

12 Because Gunn is proceeding *pro se*, the Court construes his pleadings liberally and  
13 affords him the benefit of any doubt. See *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621,  
14 623 (9<sup>th</sup> Cir. 1988). That said, "[p]ro se litigants must follow the same rules of procedure that  
15 govern other litigants." *King v. Atiyeh*, 814 F.2d 565, 567 (9<sup>th</sup> Cir. 1987).

16 **II. Procedural History**

17 The R&R covers the history of Gunn's conviction and state habeas proceedings in  
18 great detail. From the Court's perspective, the essentials are as follows.

19 Gunn was convicted in September, 1999 and is now in prison serving a 17-year  
20 sentence.

21 On November 9, 2004, Gunn's conviction became final. His one-year statute of  
22 limitations to file a federal habeas petition began to run the following day, November 10,  
23 2004. Gunn does not dispute this. (Obj. to R&R at 2.)

24 Gunn filed a state habeas petition on November 1, 2005 in the California Superior  
25 Court, thereby tolling the statute of limitations period for his federal habeas petition ten days  
26 before it would expire. Again, Gunn does not dispute this. (*Id.*)

27 From November 1, 2005 through February 1, 2008, Gunn litigated his state habeas  
28 petition.

1 On May 22, 2008, Gunn finally filed his federal habeas petition. (Dkt. No. 1.)

2 **III. Discussion**

3 **A. Statutory Tolling**

4 AEDPA's one-year statute of limitations for federal habeas petitions is tolled for "[t]he  
5 time during which a properly filed application for State post-conviction or other collateral  
6 review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2).  
7 Gunn concedes that the clock started ticking on his federal habeas petition on November 10,  
8 2004, and that he did not file that petition until May 22, 2008. (Obj. to R&R at 2.) Thus,  
9 absent tolling, Gunn's federal petition is clearly untimely.

10 Gunn did, however, file a state habeas petition on November 1, 2005. Although he  
11 acknowledges that **355 days** passed after his state court judgment became final wherein he  
12 sought no habeas relief whatsoever, he argues that filing his state habeas petition when he  
13 did entitled him to tolling and preserved his right to subsequently file a federal habeas  
14 petition. That is true, but only so far. The statute of limitations on Gunn's federal habeas  
15 petition was tolled a mere ten days before it would expire. Accordingly, Gunn had only ten  
16 days, once his state habeas petition was finally denied, to file his federal petition. He waited  
17 111 days. The California Superior Court denied Gunn's final habeas petition on February  
18 1, 2008, and he did not file his federal petition until May 22, 2008. The R&R has it right: "At  
19 minimum, 466 days passed without statutory tolling before the Petition for Writ of Habeas  
20 Corpus was filed in the United States District Court for the Southern District of California on  
21 May 22, 2008." (R&R at 11.)

22 Salazar takes Gunn even more to task and alleges that "Petitioner 'used' 762 days  
23 between the date that his judgment became final in state court and the constructive filing of  
24 his federal petition." (Mot. to Dismiss at 15.) The basis for this claim is that there were  
25 intervals of time when Gunn was pursuing state habeas relief during which he was not  
26 entitled to statutory tolling. (*Id.* at 14-15.) The R&R avoids this issue, and properly so.  
27 (R&R at 11.) For Gunn to be barred from filing a federal habeas petition, only 365 days need  
28 to have passed, after his state conviction became final, when he was not pursuing state

1 habeas relief. Whether Gunn was 111 days or 397 days late in filing his federal habeas  
2 petition is beside the point. He was late by a lot of days.

3 **B. Equitable Tolling**

4 AEDPA's one-year statute of limitations for federal habeas petitions is also subject  
5 to equitable tolling. The Ninth Circuit has held, however, that "[e]quitable tolling will not be  
6 available in most cases, as extensions of time will only be granted if 'extraordinary  
7 circumstances' beyond a prisoner's control make it impossible to file a petition on time."  
8 *Calderon v. Beeler*, 128 F.3d 1283, 1288 (9<sup>th</sup> Cir. 1997). To be entitled to equitable tolling,  
9 Gunn bears the burden of demonstrating "(1) that he has been pursuing his rights diligently,  
10 and (2) that some extraordinary circumstances stood in his way." *Pace v. DiGuglielmo*, 544  
11 U.S. 408, 418 (2005). Those "extraordinary circumstances" must be the but-for and  
12 proximate cause of his untimeliness. *Spitsyn v. Moore*, 345 F.3d 796, 799 (9<sup>th</sup> Cir. 2003).

13 The R&R takes Gunn's request for equitable tolling seriously but concludes it should  
14 not be granted. (R&R at 11-13.) The Court agrees. Gunn hangs his request for equitable  
15 tolling on the fact that he thought the California Innocence Project would file his federal  
16 habeas petition for him. However, as the R&R is correct to point out, Gunn goes into little  
17 detail about what role the California Innocence Project played in his case and what promises  
18 the organization made to him. (*Id.* at 12.) While having to file his federal habeas petition  
19 himself may have **slowed** Gunn, it certainly did not **prevent** him from filing on time. The  
20 Court does not find the California Innocence Project's inability to assist Gunn to be an  
21 extraordinary circumstance that entitles him to equitable tolling. Nor, as a general  
22 proposition, is a habeas petitioner's lack of legal sophistication, "by itself, an extraordinary  
23 circumstance warranting equitable tolling." *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9<sup>th</sup> Cir.  
24 2006).

25 **IV. Objections**

26 Gunn filed timely objections to the R&R on January 2, 2009. He made four specific  
27 objections, which the Court will address in turn.

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1           **1. Unexhausted Claims**

2           According to Gunn, the R&R “incorrectly concludes” that his federal habeas petition  
3 contains two unexhausted claims. (Obj. to R&R at 2.) The R&R draws no such conclusion,  
4 but rather cites to that contention in Salazar’s motion to dismiss. (R&R at 4.) More  
5 importantly, the R&R makes clear that this issue is not relevant to its conclusions because  
6 Gunn’s petition is nonetheless barred by AEDPA’s statute of limitations: “However,  
7 Respondent’s claim that Petitioner’s Petition is barred by the statute of limitations supplants  
8 Respondent’s claim as to the mixed petition. Subsequently, the Court has chosen to solely  
9 address the statute of limitations claim.” (R&R at 4 n.3.)

10           **2. AEDPA’s Statute of Limitations**

11           Gunn also disputes that his federal habeas petition was untimely. (Obj. to R&R at  
12 2-4.) He concedes that he filed his first state habeas petition on November 1, 2005, 356  
13 days after his AEDPA statute of limitation began to run on November 10, 2004. Accordingly,  
14 he argues, “Petitioner is entitled to tolling because this filing was timely.” (*Id.* at 2.) Here,  
15 Gunn takes issue with Salazar’s argument – already deemed irrelevant by the Court – that  
16 there were intervals of time when Gunn was pursuing state habeas relief during which he  
17 was not entitled to statutory tolling. For example, Gunn argues: “The intervals between  
18 denial in one court and the filing of a ‘new’ petition in a higher court will not interrupt tolling  
19 as long as there is no ‘unreasonable’ delay between denial of relief in a lower court and the  
20 filing of the petition in the next higher court.” (*Id.* at 4.) True or not, Gunn fails to address  
21 the interval of time that is ultimately fatal to his case: the 111 days he waited once his state  
22 habeas petition was denied to file a federal habeas petition. During that time, no state  
23 habeas petition was pending, the clock was ticking on Gunn’s federal habeas petition, and,  
24 for the purposes of this Court’s analysis<sup>1</sup>, AEDPA’s statute of limitations eventually expired.

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28           <sup>1</sup> Recall that the Court has avoided the question whether Gunn also lost time at various intervals when he was still pursuing state habeas relief.

### 3. The *Schlup* Standard

With little explanation, Gunn invokes *Schlup v. Delo*, 513 U.S. 298 (1995), which stands for the proposition that in exceptional cases involving a compelling claim of actual innocence, the procedural default of claims in state court will not bar a federal habeas corpus petition. (Obj. to R&R at 4-5.) Neverminding that the procedural default at issue here is not state but **federal**, there is simply no compelling claim of innocence before the Court. The letters from the California Innocence Project that Gunn submitted in this case cut against his interests here. The first letter, from a student devoted to Gunn's case, states: "I was unable to find new evidence that is strong enough to survive the strict review by a court that a writ of habeas corpus must withstand." (Opp. to Mot. to Dismiss at Ex. A.) Certainly the Court would relax procedural formalities and let Gunn's federal habeas petition slide if doing so would avoid a manifest injustice – the essential spirit of *Schlup* – but Gunn has not brought a compelling claim of innocence before the Court.

### 4. California Innocence Project

Finally, Gunn reasserts that he filed his state habeas petition with just ten days remaining in AEDPA's statute of limitations because he believed, mistakenly, that the California Innocence Project was going to file the petition for him. (Obj. to R&R at 5.) Based on the two letters from the California Innocence Project that Gunn submitted, he argues that "[t]hey most definately were planning on filing a Writ of Habeas Corpus on the behalf of Petitioner." (*Id.* at 5.) This does not rise, even remotely, to the level of an extraordinary circumstance that would entitle Gunn to equitable tolling. The Ninth Circuit has declined to apply equitable tolling even where **attorney negligence** caused the filing of a petition to be untimely. *Spitsyn*, 345 F.3d at 800.

While the letters Gunn submitted from the California Innocence Project do suggest that the organization intended to help him file a timely habeas petition, their respective dates ultimately dent his cause. The California Innocence Project first notified Gunn that it could not help him pursue his claim of innocence on April 21, 2005. (Obj. to Mot. to Dismiss at Ex. A.) In a follow-up letter dated June 1, 2005, the Executive Director of the California

1 Innocence Project further explained to Gunn why it decided to close his case. (Obj. to Mot.  
2 to Dismiss at Ex. B.) Between June 1, 2005 and November 1, 2005, the day Gunn filed his  
3 state habeas petition and tolled AEDPA's statute of limitations, **153 days** elapsed. The  
4 Court agrees with the R&R's conclusion that the California Innocence Project's inability to  
5 help Gunn did not prevent him from filing a timely federal habeas petition.

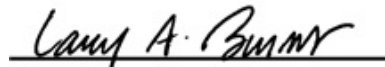
6 The Court also rejects, as the R&R did, Gunn's claim that his "confusion about state  
7 court timeliness" and "his own ignorance about the law in conjunction with California's  
8 complicated unique postconviction practice" entitles him to equitable tolling. (Obj. to R&R  
9 at 5-6.) Filing a proper habeas petition may have its challenges, but this Court cannot so  
10 easily excuse *pro se* litigants from foundational procedural norms.

11 **V. Conclusion**

12 Gunn's filed his federal habeas petition entirely too late and with no good reason. His  
13 objections to the R&R are hereby **OVERRULED**, the R&R is **ADOPTED**, and Salazar's  
14 motion to dismiss is **GRANTED**. Gunn's petition is **DISMISSED** for failure to file within the  
15 one-year statute of limitations set forth in AEDPA.

16 **IT IS SO ORDERED.**

17 DATED: March 27, 2009

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19 **HONORABLE LARRY ALAN BURNS**  
20 United States District Judge  
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